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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES SCHNABOLK, KALON SYSTEMS, INC.
and ANDRA SYSTEMS, INC.,

Petitioners,

—v.—

SECURITRON MAGNALOCK CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The judgment below presents the following issues for review:

1. Does a single individual who does business through his two closely held corporations sharing a single walk-up office, with one corporation having zero employees and the other havin a historical maximum of 15 employees by, himself constitute an "enterprise" as that term is used in the civil RICO statute?

2. Does the civil RICO statute permit the persons alleged to have committed RICO acts to be exactly the same as the RICO enterprise, with no enterprise existence beyond the particular acts alleged?

3. Does New York's Constitution permit a court to issue an injunction imposing a prior restraint of allegedly defamatory speech?

PARTIES TO THE PROCEEDING

There are no parties to this case other than those appearing in the caption.

Pursuant to Rule 29.1 of the Rules of this Court, appellants state that neither Kalon Systems, Inc. nor Andra Systems, Inc. has any parent corporations, and neither has sold any shares to the public.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NO. _____

SECURITRON MAGNALOCK CORP.,

Plaintiff-Respondent,

-against-

CHARLES SCHNABOLK, KALON SYSTEMS, INC. and ANDRA SYSTEMS, INC.,

Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the opinion issued by the United States Court of Appeals for the Second Circuit on September 7, 1995 (1a*), *Securitron Magnalock* v. *Charles Schnabolk*, 65 F.3d 256 (2nd Cir. 1995), which affirmed the order and judgment of the District Court

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* Page references incorporating the letter 'a' refer to the appendix.

dated October 18, 1994 (24a).

STATEMENT OF JURISDICTION

In seeking review of the decision of the United States Court of Appeals for the Second Circuit, petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

19 U.S.C. § 1962(c):

It shall be unlawful for any person employed or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

New York State Constitution Article I, Section 8:

Every Citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth

may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

STATEMENT OF CASE

This case stems from a business dispute between two competitors in the magnetic lock business.

The plaintiff-respondent, Securitron Magnalock Corp. ("Securitron") is a major national manufacturer of magnetic locks.

The defendant-petitioner Charles Schnabolk ("Schnabolk") is an engineer who at one time installed Securitron products until he came to the conclusion that there were technical and safety problems with the Securitron magnetic lock and decided to go out on his own to manufacture and install magnetic locks of his own design in the New York metropolitan area. To accomplish this, Schnabolk formed two corporations: the defendant-petitioners Kalon Systems, Inc. ("Kalon") and Andra Systems, Inc. ("Andra"). Both Kalon and Andra were small, closely held corporations operating with zero to minimal managerial staff other than Schnabolk himself, doing business out of a small walk-up office in Manhattan

in New York City.[1]

After the split between Schnabolk and Securitron, Schnabolk, who was a prolific yet clearly untalented letter writer and who was endowed with little tact, proceeded to express his opinion regarding the Securitron lock to whomever would listen. Thus, he wrote rambling letters regarding the Securitron lock to numerous governmental agencies and regulatory authorities, he wrote a letter to the editor in a security trade publication, he wrote to Underwriters Laboratories threatening that if they continued approving the Securitron lock he would expose them as a fraud, he stated to a Newark, New Jersey civil servant that if he awarded Securitron a contract the Schnabolk would get him fired—a threat that the civil servant testified he never took seriously—and he engaged in other similar antics. Schnabolk wrote his letters on different letterheads, including those of Kalon and Andra.

Not to be outdone, Securitron also bad-mouthed Schnabolk's lock. Securitron's president described this as

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[1] The Court of Appeals' decision states that Schnabolk "sold his controlling interest [in Andra] to undisclosed individuals" on May 1, 1989. However, Appellant is not aware of such a sale and there is no basis in the record for this. It would appear that the Court of Appeals based this conclusion on one of the numerous misrepresentations of fact contained in the brief submitted by the respondent, which made numerous factual assertions without specific reference to the record.

the "New York magnetic locks wars."

In the end, Securitron was a much larger and richer company than Schnabolk. In order to gain a commercial advantage and stop Schnabolk from bad-mouthing the Securitron's lock, Securitron hired private investigators and lawyers admittedly to create "fodder" for a lawsuit, and when they had stitched together enough statements by Mr. Schnabolk to form a complaint, in October, 1989 Securitron brought a lawsuit in the United States District Court for the Southern District of New York, alleging civil RICO violations, 18 U.S.C. 1964(c) with predicate acts of mail fraud and wire fraud based on Schnabolk's letter-writing campaign, extortion, obstruction of justice and perjury based on an allegedly false statement made during a civil deposition, conspiracy to commit RICO violations and other claims that the fertile mind of Securitron's counsel, dredged up.

The complaint also contained a New York common law libel claim, and a claim for a purported violation of New York General Business Law § 349, which is a consumer fraud statute and has nothing to do with a commercial dispute. See, *H2O Swimwear, Ltd. v. Lomas*, 164 A.D.2d 804, 560 N.Y.S.2d 19, 21 (1st Dept. 1990).

Before the trial and throughout the trial, defense counsel made repeated motions to dismiss the RICO claims as well as the claims brought pursuant to New

York General Business Law § 349. Each of these motions was denied.

The main argument advanced in support of the application to dismiss the RICO claims was that Securitron had failed to allege or prove the existence of a proper RICO enterprise. The only RICO enterprise ever alleged was Schnabolk, and his two corporations, Kalon and Andra, who are each also alleged to be the RICO persons and who are all nothing but Schnabolk with his different hats or different piles of stationary.

The primary argument advanced in support of the application to dismiss the New York General Business Law § 349 claim was that the damages alleged by Securitron were private to Securitron, and did not impact the public interest in the slightest degree. Indeed, until the Second Circuit decided this case, § 349 had never been held by any court to apply to a private dispute where damages to the public were at best incidental.

The case was tried to a plaintiff's verdict before Magistrate Judge Buchwald (with consent of all parties) and a jury, commencing on July 25, 1994 and ending August 2, 1994. The jury awarded the plaintiff a totally speculative[2] award of $150,000 for lost profits, $100,000

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[2] The only testimony regarding damages was that of Securitron's president who testified that in his "opinion" Securitron

(continued next page)

for out-of-pocket expenses and $100,000 for loss of goodwill, which appears to be duplicative of the lost profits. The trial court then trebled the award pursuant to the RICO statute and without a hearing added over $300,000 in counsel fees and costs. The end result is that Securitron has won the magnetic locks wars and Schnabolk is now basically out of business. The trial court also issued an injunction imposing a prior restraint against Schnabolk making certain statements regarding the Securitron lock.

Clearly, Schnabolk and his unsavory brand of antics impressed neither the trial judge nor the jury. However, even Mr. Schnabolk's disagreeable nature does not suffice to create a RICO claim or a consumer fraud claim out of this ordinary business squabble between two competitors.

This was clearly never a proper RICO case since there was never any RICO enterprise: Charles Schnabolk with his two corporations and two sets of letterhead was never anything more than Charles Schnabolk and his ongoing gripes against Securitron.

In a remarkable departure from its own precedent and the case law of numerous other circuits (see discussion below), the Court of Appeals chose to

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had been damaged by virtue of Schnabolk's bad-mouthing.

overlook the fact that the alleged enterprise was nothing but Schnabolk and his two corporations, one of which had no employees at all. The court's reasoning was merely that:

> these were active, operating businesses rather than two stacks of stationary. Despite Schnabolk's links to each corporation, he, along with his two corporations, clearly is a RICO person as well as a member of a RICO enterprise

(17a). Thus, the Court of Appeals has departed from what has been the law and held that an individual who does business through two closely held corporations can be sued under civil RICO for acts which done in his own name alone could not possibly be RICO. The potential of this decision to permit ordinary disputes to become civil RICO cases is a dangerous and undue extnension of RICO beyond what was ever intended by Congress in enacting RICO.

Similarly, the plaintiff's claims under New York General Business Law § 349 were never tenable. As will be shown below, § 349 is and was intended as a consumer fraud statute, and was never meant to apply to an ordinary business dispute between commercial competitors.

REASONS FOR GRANTING THE WRIT

POINT I

A WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN DECIDE WHETHER AN INDIVIDUAL AND HIS TWO CLOSELY HELD CORPORATIONS, ONE OF WHICH HAD NO EMPLOYEES, CAN BE AN ENTERPRISE FOR CIVIL RICO PURPOSES, WHICH IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NEVER BEEN DIRECTLY ADDRESSED BY THIS COURT.

The most alarming aspect of the decision reached by the Second Circuit is that the court expanded civil RICO beyond all recognition, for the first time making it possible to bring a civil RICO action dealing with garden variety business disputes and defamation claims against a single individual who does business through two closely held corporations. Thus, the Second Circuit has opened the doors of the federal courts and the threat of RICO treble damages to countless garden variety state law claims which, merely adjusted to fit the mold of a civil RICO claim, can now be brought into federal court.

Petitioner submits that this expansion of civil RICO strains the intent of the statute's drafters, makes the civil RICO statute, which was intended to deal with certain extraordinary types of activity, available for far too many

ordinary business disputes, and exposes defendants to the possibility of awards of treble damages and attorneys fees.

The Second Circuit's decision accomplishes these undesirable results by expanding the realm of what may be considered a civil RICO enterprise.

The enterprise allegation is at the core of any civil RICO case. There can be no RICO case if the defendants are not alleged and proven to have conducted their RICO predicate acts through a RICO enterprise. See, 19 U.S.C. § 1962(c).

However, at least before the Second Circuit's decision, there has always been a requirement that the RICO enterprise be a meaningful entity distinct from the persons alleged to have committed the RICO acts. As Judge Posner explained, "you cannot associate with yourself, any more than you can conspire with yourself, just by giving yourself a non [sic] de guerre." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985). See, *R.R. Brittingham v. Mobil Oil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991) (collecting cases at n. 2).

The alleged RICO enterprise in this case is exactly that: Charles Schnabolk and his two *noms de guerre*, Kalon and Andra, the latter having no employees at all. Since this reflexive tautology is nothing but Schnabolk with two

hats, or piles of stationary, it cannot be a RICO enterprise and the RICO claims should have been dismissed.

To reach the conclusion reached by the Second Circuit, that Schnabolk and his two corporations can together by themselves with no one else involved constitute a civil RICO enterprise, would require that this Court overlook the obvious fact that no corporation can act except through its agents, and that if Schnabolk and his two corporations are an enterprise than any corporation and its employees must be considered an enterprise and thus it would be possible to contort any business dispute involving a corporation into a civil RICO claim.

Even the Second Circuit has recognized that the RICO person and the enterprise must be distinct and that a corporate entity cannot be both a RICO person and a RICO enterprise. *Riverwoods Chappaqua Corporation* v. *Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994). In that case, the Second Circuit wrote that:

> . . . by alleging a RICO enterprise that consists merely or a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented.

Riverwoods, 30 F.3d 339. The *Riverwoods* court went on to state:

> Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself.

Riverwoods, 30 F.3d 339.

In our case there was no one involved other than Schnabolk and his two corporations. Thus, there was no enterprise and the RICO claim should have been dismissed and never even submitted to the jury.

Until this case, even the Second Circuit has always held that a corporate enterprise cannot be both the enterprise and the person for RICO purposes. See, *Official Publication* v. *Kable News Co.*, 884 F.2d 664, 668 (2d Cir. 1989); *Bennett* v. *U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). That there must be a separate entity distinct from the defendants themselves has always been the law. See, *Alfaro Motors* v. *Ward*, 814 F.2d 883 (2d Cir. 1987).

Attempts to get around the civil RICO requirement of a distinct enterprise by claiming that the enterprise consisted of a corporation and its employees or agents have been rejected by every court which has considered the issue. See, *Board of County Commissioners* v. *Liberty Group*, 965 F.2d 879, 885 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 329 (1992); *R.R. Brittingham* v. *Mobil Corp.*,

943 F.2d 297, 300-01 (3d Cir. 1991); *Odischelidze* v. *Aetna Life & Casualty Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988); *Entre Computer Centers* v. *FMG of Kansas City*, 819 F.2d 1279, 1287 (4th Cir. 1987); *G.M.Atkinson* v. *Anadarko Bank and Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987); *Yellow Bus Lines* v. *Teamsters Local 639*, 883 F.2d 132, 139-141 (D.C. Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2839 (1991) (holding that "an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself").

The distinct character required to constitute a RICO enterprise was described in *United States* v. *Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), where the court quoted from the decision in *United States* v. *Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980):

> While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a "pattern of racketeering activity."
>
> We hold that Congress intended the phrase "a group of individual's [sic] associated in fact although not a legal entity" as used in its definition of the term enterprise in section 1961(4), to

> encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined a part [sic] from the commission of the predicate acts constituting the "pattern of racketeering activity."

U.S. v. Neapolitan, 791 F.2d at 500.

In a case almost directly in point, *D'Last Corp. v. Ugent*, 863 F.Supp. 763 (N.D. Illinois 1994), an argument was made by one competitor that other competitors and their employees had used illegal and improper tactics. The defendant corporations and their employees were alleged to be the enterprise. In that case, the alleged RICO activities were far more egregious than anything alleged in this case: there were allegations of strong-arm methods, battery, assault, and other such claims. The Illinois District Court held that there was no enterprise and that a business dispute, even under those compelling circumstances, could not be converted into a RICO claim.

Nothing in the record of this case showed that Schnabolk and his two small corporations or any other names he may have used had a structure or criminal enterprise aside from their business of selling and installing security systems. See, *United States v. Turkette*,

452 U.S. 576, 583 (1981).

Put simply, there was no enterprise and there was no RICO case. There was absolutely no showing of any enterprise, no showing of any criminal activity and the RICO claim should have been dismissed.

The decision reached by the Second Circuit in this case would permit any individual who is an officer or employee of a corporation to be sued in federal court for civil RICO anytime upon the commission of three RICO predicate acts. In light of the ubiquitous nature of mail fraud and wire fraud as predicate act allegations in RICO cases, and the fact that almost every business fraud case involves a use of mails or telephones, the decision of the Second Circuit that a corporate officer and his two corporations, one of which had zero employees, can constitute a RICO enterprise promises only to increase the amount of frivolous RICO litigation and the consequent burden on the federal courts. It will also permit persons to be intimidated by RICO suits in situations where RICO was never contemplated to be applicible by Congress or by this Court.

Every other circuit, and indeed even the Second Circuit prior to its decision in this case, has held that the enterprise element of a RICO case is a substantive element which requires more than a single individual and his two closely held corporations.

By granting a writ of certiorari in this case, this Court would be able to closely examine whether the expansion of civil RICO heralded by the Second Circuit's decision is truly within the scope of what was intended by the RICO statute, and to resolve the conflict between the circuits that has resulted from the Second Circuit's decision in this case.

POINT II

A WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN REVIEW THE SECOND CIRCUIT'S DECISION TO SUSTAIN AN INJUNCTION IMPOSING A PRIOR RESTRAINT ON SPEECH, WHICH IS CONTRARY TO ARTICLE I, SECTION 8 OF THE NEW YORK STATE CONSTITUTION.

In addition to awarding money damages, the trial court imposed an injunction against the Schnabolk making certain statements regarding Securitron and Securitron's locks. This injunction, which imposes a prior restraint on speech, is totally contrary to the protections of free speech imposed by the New York Constitution, which surpass the protection afforded by the First Amendment to the United States Constitution.

Remarkably, however, the Second Circuit offhandedly rejected the New York State Constitution's

protections and sustained the injunction, citing no authority and not even engaging in more than a cursory sentence of discussion (21a). A writ of certiorari should be granted so that this glib rejection of the protections afforded by the duly enacted New York State Constitution can be examined by this Court.

The New York State Constitution, Article I, Section 8, specifically provides in relevant part that

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right...

If an individual abuses that right, the aggrieved party can bring a claim for damages, if it has one and if it can prove any damages. However, under these circumstances there can be no prior restraint on speech.

The cases are clear that in situations of this nature, where a plaintiff is asserting state law claims in federal court, the federal courts should look to the State Constitution and State case law in determining an issue of prior restraint on speech. While the First Amendment to the United States Constitution also applies, when state law is being applied and the state constitution is more protective of free speech, the federal courts should look to the state constitution to determine the case. See, *Kramer* v. *Thompson*, 947 F.2d 666-669 (3d Cir. 1991).

For the Second Circuit to have sustained a broadly based injunction against future statements to be made by the defendants is obviously overbroad, unwarranted and constitutes error.

Similarly, if the plaintiff were to argue that the injunction should be warranted under the libel or slander claim, it could not be upheld because (a) the court's order and judgment is based on § 349 (h) of the General Business Law; and (b) New York law is clear that equity will not restrain a libel which is to occur in the future.

In *Herink v. Harper & Row Publishers, Inc.*, 607 F.Supp. 657 (S.D.N.Y. 1985), Judge Breiant made it clear that "equity will not enjoin a libel," *Id.*, 607 F.Supp. at 660.

Judge Breiant relied upon the classic case of *Brandreth v. Lance*, 8 Paige 24 (N.Y. 1839). The *Brandreth* case has been cited with approval throughout the last 150 years and has been applied to cases where a competitor was accused of maligning a product.

The New York State Court of Appeals in *Marlin Fire Arms Co. v. Shields*, 171 N.Y. 384 (1902), stated in language directly applicable to this case:

> The constitutional guaranty of freedom of speech and press, which in terms provides that 'every citizen may freely speak, write and publish his sentiments on all subjects, being

> responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press' (State Constitution, art I, §8), has for its only limitations the law of slander and libel. . .

and further stated:

> but the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require, and, in case of the violation of the provisions of such decree, the usual course and practice of equity would necessarily be invoked, which would authorize the court to determine whether such published articles were contrary to the prohibitions of the decree, and, if so found, punishment as for a contempt might follow. Thus a party could be punished for publishing an article which was not libelous and that too without a trial by jury.

Similarly, Justice Cardozo with his customary eloquence spelled out that such a prior restraint would not be proper:

> Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker. If there is redress for such a wrong, unassociated with wrongful acts, the remedy is not in equity.

Nann v. Raimist, 255 N.Y. 307, 317, 381 (1931).

Thus, the injunction issued by the trial court, which was grounded in New York Statutory law, General Business Law § 349, clearly violates New York's constitutional free speech protections. This Court should grant a writ of certiorari so that departure from New York's Constitutional law can be addressed.

CONCLUSION

For the reasons set forth herein, this Court should grant the instant petition for a writ of Certiorari, so that the Second Circuit's unwarranted expansions of the civil RICO statute and New York's General Business Law § 349, as well as that court's decision to reject the free speech provisions of the New York State Constitution can be addressed by this Court.

Dated: December 5, 1995

Respectfully submitted,

By: _____

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1531—August Term, 1994

(Argued: May 4, 1995 Decided: September 7, 1995)

Docket No. 94-9194

SECURITRON MAGNALOCK CORP.,

Plaintiff-Appellee,

—v.—

CHARLES SCHNABOLK, KALON SYSTEMS, INC. and ANDRA SYSTEMS, INC.,

Defendants-Appellants.

CHARLES SCHNABOLK, KALON SYSTEMS, INC. and ANDRA SYSTEMS, INC.,

Counter-Claimants,

—v.—

SECURITRON MAGNALOCK CORP.,

Counter-Defendant.

Before:

MINER, JACOBS and CABRANES,
Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York (Buchwald, M.J.) awarding damages, attorney's fees and costs, and enjoining defendants from engaging in deceptive acts and practices following jury verdict favorable to plaintiff on claims arising under the RICO Act, the New York General Business Law and the New York law of defamation.

Affirmed.

DAVID JAROSLAWICZ, New York, NY (Robert J. Tolchin, Jaroslawicz & Jaros, of counsel), *for Defendants-Appellants-Counter-Claimants.*

NATHANIEL H. AKERMAN, New York, NY (Bernard A. Solnik, Seyfarth, Shaw, Fairweather & Geraldson, of counsel), *for Plaintiff-Appellee-Counter-Defendant.*

MINER, *Circuit Judge*:

Defendants-appellants Charles Schnabolk, Kalon Systems, Inc. ("Kalon") and Andra Systems, Inc. ("Andra") appeal from a judgment entered in the United States District Court for the Southern District of New York (Buchwald, M.J.) awarding damages in the total amount of $1,050,000, attorney's fees in the sum of $284,134 and costs of $58,847 and enjoining them from engaging in deceptive acts and practices. The judgment followed a jury verdict favorable to plaintiff-appellant Securitron Magnalock Corp. ("Securitron") under the Racketeer Influenced and Corrupt Organization Act ("RICO"), the New York General Business Law and the New York law of defamation. We affirm in all respects.

BACKGROUND

Based on the evidence, the jury could have found the following.

I. *The Parties.*

Securitron is a manufacturer of electromagnetic locks and relating locking system equipment. Electromagnetic locks are devices that lock doors by using electricity to generate a magnetic field. The lock manufactured by Securitron is known as the Magnalock, and it is sold in most part to security equipment wholesalers who in turn sell to installing companies. Securitron also sells accessory products for the Magnalock such as power supplies, entrance controls and releasing devices.

Kalon is in the business of installing security equipment, and Schnabolk was its owner and President at all times relevant to this litigation. In 1988, Osborne

Frazier, a former Security Director for the Newark, New Jersey School System, was the Vice President in charge of marketing. Kalon never had more than six permanent employees during the period in question.

Andra is in the business of manufacturing alarm systems, electromagnetic locks and related items. Its electronic lock is known as the Andralock, and Schnabolk was its principal owner until May 1, 1989, when he sold his controlling interest to undisclosed individuals. Schnabolk was Vice President of this corporation and, at least at some point, one Louie Delisio was President. Frazier also was a Vice President of Andra, which apparently had no other employees. Kalon and Andra shared office space at 74 Warren Street in New York City.

II. *Communications to the Bureau of Standards and Appeals.*

At all relevant times, the New York City Bureau of Standards and Appeals ("BSA") was the only city agency having jurisdiction to approve materials, including electromagnetic locks, for use in city construction projects. The Magnalock has been approved by the BSA since September, 1980. On August 2, 1988, Schnabolk wrote on Kalon stationery to BSA Commissioner Raymond Lawrie, stating that the Magnalock had " 'shorted' into a locked position on numerous occasions," that the Magnalock "failed our laboratory test when we applied the 1000 volt test" and that Kalon "currently [has] a contract to remove these locks from a Newark school because of the shorting/failure problem." In fact, there was no evidence that the Magnalock ever shorted into a locked position, and a short in the system would result in the lock remaining open instead of closed in any event. Also, there was no evidence of the failure of a "1000

volt test" or of the existence of a contract with the Newark schools to remove any locks. After making the foregoing misrepresentations, Schnabolk concluded his letter to Commissioner Lawrie by asking him to "review th[e] Securitron application and let me know if they are to retain their [BSA] listing."

On June 16, 1989, Schnabolk wrote to Kathleen A. Carney, Executive Director of the BSA, on stationery bearing the heading "Institute for Security Design." In that letter, Schnabolk reiterated his allegation regarding "the potential danger that [the Securitron Magnalock] creates when used in fire safety situations." He also stated that he had been informed by Underwriters Laboratories ("UL") that the Securitron locking system had failed certain tests and that the Securitron lock was not on the UL approved list. Both statements were false. Schnabolk concluded his letter to Ms. Carney by suggesting that it would be "in the best interests of all concerned" if Securitron were removed from the BSA approved list.

III. *Communications With and Concerning UL.*

Since 1984, the Securitron Magnalock has been included on the UL approved list. Certain end users of electromagnetic locks apparently required UL listing for the locks they employ. On October 13, 1988, Schnabolk wrote a letter to UL on Andra stationery, falsely representing that the Securitron lock had "shorting problems." UL promised to investigate but, because no action was taken, Schnabolk wrote again on June 20, 1989 in his capacity as Executive Director of the Institute for Security Design and as Andra President. In this letter he noted that the Securitron Magnalock "poses a potentially life-threatening situation" because of its "tendency to

'ground' into a locked position when it should be 'opened.' " Schnabolk threatened UL that he would expose its inaction in lectures and publications and would attempt to have UL removed from the BSA approved list of testing laboratories.

UL continued to approve the Magnalock, and Schnabolk made good on his threats. In September 1989 he spoke before the American Society of Industrial Security at Nashville, Tennessee. In his speech he said that UL is "the greatest fraud in America," that it "has done nothing for the security industry," that its "tests are irrelevant," and that UL "stands for useless and lacks credibility."

IV. *Installations at Four Newark High Schools.*

A Securitron dealer, Absolute Protective Systems, submitted a bid on September 3, 1987 to install electromagnetic locks at four high schools operated by the Newark Board of Education. Absolute's bid was $190,800, but it lost out to Kalon, which bid $153,300 to install Andralocks. It appears that Kalon's bid was less than cost and that only sixty percent of the work was completed when Kalon abandoned the job sites. Many of the Andra locks that were installed did not operated properly, fire department and UL approvals were lacking for them, and city and state permits had not been obtained. When Robert Salvatore, the Principal Engineer for the Newark Board of Education, withheld final payment to Kalon as the result of these deficiencies, Schnabolk threatened to have him removed from his position. Later, Schnabolk asked the Board of Education "to fire Salvatore outright." Kalon eventually received full payment.

After Kalon was awarded the contract for the four high schools, Schnabolk took steps to prevent future bids by Absolute in Newark. On September 10, 1987, he wrote a letter on Kalon stationery to the New Jersey Department of the Treasury. In the letter he referred to "the submission of a forged Pre-Qualification Statement by Absolute Protection Systems" and requested that "some penalty" be imposed upon that firm. Schnabolk later admitted that his purpose in making this false accusation "was to disqualify Absolute . . . from ever bidding again in Newark."

V. *Bidding on Nine Additional Newark High Schools.*

After the installation of Andralocks by Kalon in the four high schools in 1988, the Newark Board of Education began to plan for the installation of electromagnetic locks at nine additional high schools. Anticipating the upcoming bids for this work, Osborne Frazier, Kalon's Vice President for Marketing, sent a letter on October 18, 1988 to Joseph Imperiale, Senior School Construction Inspector for the Newark Board of Education. Frazier wrote: "New York City has banned several other lock/magnets, and categorized them as illegal for installation on fire exits as they are prone to shorting-out, and are potentially hazardous. Securitrons [sic] lock/magnet happens to be one of that number."

Following this false statement regarding the Securitron lock, Schnabolk on November 3, 1988 wrote on Kalon stationery to James Kokkalis, Director of the Division of Design and Construction for the Newark Board of Education. In his letter, Schnabolk advanced similar false information: "The manufacturer that had his lock mounted on the doors of a Newark HS refuses all requests for replacement of defective units . . . even

though they sold the locks with a 5 year guarantee. This firm is Securitron and they have been rejected by the NYC Bureau of Standards and Appeals because of a basic design deficiency and they are prone to false alarms."

The Newark Board of Education issued the specifications for installation of electromagnetic locks at the nine additional high schools in or about March of 1989. The specifications were written and provided by another Schnabolk entity, the Institute for School Security, apparently in violation of a New Jersey rule prohibiting those who would bid from writing the specifications. Originally, the Securitron Magnalock was prohibited, but that prohibition was removed from the specifications before the bidding at the instance of Ahmed Khalifa, the Principal Engineer for the Board of Education. On March 7, 1989, four contractors submitted bids, with Kalon offering the Andralock and the three others offering the Securitron Magnalock. Kalon was the highest bidder. The two low bidders were Professional Security Corp. on eight schools and Absolute on one school.

Less than one week after the bids were opened, Frazier sent a letter on Andra stationery to Kokkalis, who was Khalifa's supervisor. Attacking the Securitron lock, Frazier wrote that a Securitron contractor "was eliminated [last year] and threatened with a default" by the New York City Health and Hospitals Corporation and that "it is now illegal to use the Securitron lock on any fire exit door in NYC." Frazier also suggested that the Securitron lock is "not technically capable of producing a fail safe system" and therefore "should be eliminated from the bidding process." In a letter dated April 4, 1989, Schnabolk wrote to Kokkalis on Kalon stationery, substantially reiterating the false information supplied

by Frazier. On June 21, 1989, Frazier wrote to Kokkalis on Andra stationery, falsely asserting that Absolute had "submitted a fraudulent (forged) 'Notice of Classification' last year on similar work." Following this assertion, he stated: "We had assumed that such action would preclude any future awards by your School Board."

VI. *Threats to Khalifa.*

Soon after Khalifa recommended to the Newark Board of Education in May of 1989 that contracts be awarded to Professional Security Corp. and Absolute, Schnabolk called Khalifa and threatened to "destroy" him through high-level contacts at the Board. Schnabolk reiterated the false statements that the Securitron locks were prohibited from being used in New York and that they shorted out in a locked position. On May 18 Khalifa called Schnabolk as directed by his superior, Kokkalis, to follow up on a letter Schnabolk had sent to Kokkalis. In that conversation, Schnabolk again threatened to "destroy" Khalifa and said that he would have him removed from his job if Kalon did not receive the contract for the nine high schools.

In August of 1989, Schnabolk wrote to Kokkalis that "[i]t would be in the best interests of the Newark Board of Education if Khalifa were removed from his highly sensitive job as soon as possible." Apparently, Schnabolk made numerous attempts to accomplish this goal. Khalifa testified that "great pressure" was brought to bear upon him by his superiors to award the contract to Kalon, the high bidder. Ultimately, neither the Securitron dealers nor Kalon were awarded the contract, and Khalifa was removed from his position with the Newark Board of Education.

VII. *Replacement at Barringer High School.*

By falsely representing that the Securitron Magnalocks installed at the Barringer High School in Newark were defective, Schnabolk was able to replace them with Andralocks. Prior to 1985, Kalon had used Magnalocks in its business, and during that time it had installed them in the Barringer High School. In February of 1988, however, Schnabolk convinced Layton Swinney, the Director of Security at the Newark Schools, to award the Institute for Security Design a maintenance contract to repair the electromagnetic locks that had been installed at the Barringer High School. Schnabolk used that contract to sell Andralocks in circumvention of the New Jersey Bidding Law that requires bidding for any contract worth $10,000 or more. Instead of repairing the Magnalocks, Schnabolk replaced them with Andralocks.

To justify the replacements, Andra provided Swinney with three Magnalocks, claiming that they had shorted into a locked position. In fact, the locks were fully operable. Not only were properly functioning Magnalocks removed from Barringer High School, but the Andralocks that were used to replace them did not work. Moreover, contrary to an assertion made by Schnabolk that Magnalocks had been returned to Securitron for replacement, no defective locks had ever been returned to Securitron.

VIII. *Communications with the Health and Hospitals Corporation.*

The Neponset Health Care Center, a facility of the New York City Health and Hospitals Corporation ("HHC") sought bids for electromagnetic lock installations. There were at least three bidders, including Kalon,

and the bids were opened on May 11, 1988. The contracts were awarded to the low bidder, a Securitron dealer. On August 18, 1988, at Schnabolk's request, members of the HHC staff met with Schnabolk and Frazier to discuss the bids. Schnabolk said that he wanted the low bidder to be "thrown out" and "banned from ever doing a job for" HHC. He repeated the falsehood that the Securitron Magnalock did not have BSA approval and that "the lock shorts out." On the day following the meeting, Schnabolk wrote to the HHC on Kalon stationery, again noting the lack of "fail-safe integrity" of the Securitron lock and asking that the Securitron dealer be eliminated from the bidding.

On October 24, 1988, by letter written to HHC, Schnabolk once again sought the disqualification of the Securitron dealer from bidding on HHC contracts. In that letter, addressed to Mr. Kenneth McNutt, a Vice President of HHC, Schnabolk wrote: "I am initiating action to sue you and other members of your strange organization, and if you don't answer me, you will have to eventually answer to the D.A. or the Mayor's Committee on Corruption." Ultimately, the award to the Securitron dealer was cancelled and the contract was not awarded to any of the bidders.

IX. *Communications with the American Society of Industrial Security.*

The American Society of Industrial Security ("ASIS") is an organization of security professionals who are potential customers for electromagnetic locks. *Security Management* is the official magazine of ASIS, and its January 1989 issue included an article describing the use of the Securitron Magnalock as part of the security system at the Santa Barbara Museum of Art. Responding to

the article in a letter to the magazine's editor dated January 20, 1989 on the stationery of the Institute for Security Design, Schnabolk represented himself as a "consultant and a long time user" of electromagnetic locking systems. In the letter, Schnabolk falsely represented that the Magnalock posed a danger to the occupants of any building where the locks were used and that "the New York City Fire Department has . . . found them unacceptable and removed [them] from the list of approved locks a few months ago." Schnabolk also falsely represented that "[t]he Newark Board of Education regularly issues contracts to have them removed from the schools that had them installed before they realized what they were getting."

In his September 1989 lecture at the ASIS Conference at Nashville, Tennessee, Schnabolk put on a slide show that included a slide explaining why the Magnalock should not be used. In the slide, a line was drawn through the Securitron name and there was the following false statement: "Securitron loses [BSA] approval due to defective design in 1988." Copies of the slide were widely distributed at various trade shows to architects and potential lock customers.

X. *Letter to Securitron Sales Representatives.*

Falsely representing himself as "a purchaser of the Securitron lock for the last five years," Schnabolk sent to three of Securitron's major sales representatives a copy of a letter dated June 27, 1989 that he had written to the Chairman of the Board of Securitron. The sales representatives are independent commission salesmen who sell Securitron products to distributors, dealers and end users. In this letter, Schnabolk wrote that he had information that Securitron's Vice President for Mar-

keting had "lied to the New York City Building Department by claiming that the lock was approved by UL . . . and as a result, the lock is now outlawed in NY." The letter referred to the increase in "returns of defective units" and included a statement that "[t]he lock has always been difficult to mount and electric shorts due to poor wire insulation has [sic] always been a problem." Securitron introduced evidence demonstrating the falsity of each of the quoted statements. In discussing the declining quality of the Securitron lock, Schnabolk wrote that he "recognize[d] the symptoms of a company that is going out of business."

XI. *The Telephone Call to General Motors.*

Using the name "Greg Saunders," Schnabolk placed a telephone call on July 18, 1989 to Danny Whiteman, a senior General Motors security manager. The call was made to Whiteman's office in Warren, Michigan, and Schnabolk left the Kalon telephone number as a call back number with Whiteman's secretary. General Motors had been a Securitron customer for some years, and Whiteman was involved in the design of electronic security systems for his employer. When Whiteman called back, Schnabolk identified himself as an independent security consultant and inquired whether General Motors had experienced any difficulties with the Securitron Magnalock. He received a negative response to his question. Schnabolk repeated to Whiteman the same misrepresentations that he had made to others on numerous occasions: that the Securitron lock had short circuit problems and that it was "barred" in New York.

XII. *The Verdict and the Judgment.*

In response to specific questions regarding Securitron's RICO claim, the jury found: that the defendants Schnabolk, Kalon and Andra constituted an "enterprise;" that the defendants engaged in two or more acts of "racketeering;" that the racketeering acts were connected by a common scheme, plan or motive; that the acts were committed within ten years of each other and constituted a pattern of racketeering; and that Securitron suffered an injury in its business as the result of the pattern. On this claim, the jury assessed damages as follows: $150,000 for lost profits; $100,000 for out-of-pocket expenses and $100,000 for injury to reputation and/or loss of goodwill.

With respect to Securitron's defamation claim, the jury specifically found that defendants made false written or oral statements that disparaged Securitron's business methods and integrity; that the statements were communicated to a third party; and that the statements were made with malice. Damages duplicative of those found on the RICO claim were assessed.

As to the claim pleaded under New York Business Law § 349, the jury found that the defendants engaged in materially deceptive acts and practices within the State of New York; that the primary injury resulting from the acts and practices was suffered by the public; and that Securitron was injured by the deceptive acts and practices. Out-of-pocket expenses of $100,000 and damages for loss of reputation of $100,000, both duplicative of the damages award for those items in the RICO claim were awarded.

The district court signed and entered an Order and Judgment in which it trebled the RICO damages to

$1,050,000, awarded attorney's fees under the RICO statute and the New York General Business Law in the amount of $284,134, costs in the sum of $58,847 under the RICO Act, and permanently enjoined the defendants from engaging in materially deceptive acts and practices in the State of New York. Specifically, the defendants were enjoined from making the following false statements: that locks manufactured by Securitron short in a locked position; that Securitron locks are barred in New York City; that the Newark Board of Education regularly issues contracts for the removal of Securitron locks from Newark Schools; and that Securitron locks failed a test administered by the UL.

DISCUSSION

A. *The RICO Claim*

Appellants' principal challenge to the judgment entered against them on the RICO claim rests on their contention that Securitron failed to establish the existence of a RICO enterprise. According to Securitron, Schnabolk and the two corporations through which he operated, Kalon and Andra, were persons participating in the conduct of the affairs of an "association in fact" enterprise through a pattern of racketeering activity. The jury found that Schnabolk, Kalon and Andra constituted the enterprise.

The judgment on the RICO claim rests upon the provisions of 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indi-

> rectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

"Enterprise" is defined as

> any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

18 U.S.C. § 1961(4).

Relying on *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994), appellants contend that the requirement that the enterprise be distinct from the persons who participate in the enterprise has not been met. In *Riverwoods*, the plaintiffs alleged that Marine Midland Bank was a person conducting the affairs of its own Restructuring Group, a unit of the Bank involved in restructuring loans, through a pattern of racketeering activity. We determined that the Restructuring Group was not distinct from the Bank itself and that the activities of the Group were nothing more than the activities of Bank employees carrying out the business of the bank. Where employees associate with their corporate employer solely for the purpose of carrying on the regular affairs of the employer, it cannot be said that the corporation is a separate enterprise:

> Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself. . . . Thus, where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and

> on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.

Id. at 344. Accordingly, we held that Marine Midland could not be both the RICO person and the RICO enterprise under section 1962(c). *Id.* at 344-45; *see also Bennett v. U.S. Trustco*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

While it is true that "a corporation cannot be both the enterprise and the person," *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664, 668 (2d Cir. 1989), the situation is different here. Kalon and Andra were two separate and distinct corporations. While Schnabolk was an officer or agent of each corporation, each was an independent entity that could benefit from his nefarious activities. We have held that "a corporate entity [may be] held liable as a defendant under section 1962(c) where it associates with others to form an enterprise that is sufficiently distinct from itself." *Riverwoods*, 30 F.3d at 344. Here, Kalon is an entity distinct from Andra, and both corporations are distinct from Schnabolk.

Kalon has at various relevant times employed six to 15 people. The two corporations are in distinct lines of business: Andra manufactures electromagnetic locks and other components of alarm systems; Kalon markets security systems to governmental, institutional and commercial customers and in 1990 was one of the biggest installers of electromagnetic locks on fire doors in its New York market. In short, these corporations were active, operating businesses rather than two stacks of stationery. Despite Schnabolk's links to each corporation, he, along with the two corporations, clearly is a RICO person as well as a member of a RICO enterprise.

See Jacobson v. Cooper, 882 F.2d 717, 720 (2d Cir. 1989). Moreover, the defendants together constitute an enterprise that, while consisting of no more than those three RICO persons, is distinct from each of them. *See Cullen v. Margiotta*, 811 F.2d 698, 728-30 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

Appellants argue that "Charles Schnabolk and his two one-man corporations" do not constitute an enterprise. However, even if Schnabolk owned 100% of the shares of each corporation, the corporations would be separately existing legal entities capable of constituting an association-in-fact enterprise. *See Fleischhauer*, 879 F.2d at 1297. Both corporations benefited from the illicit activities of their agents, Schnabolk and Osborne, whose fraudulent practices and defamatory statements were designed to enhance their business interests. Schnabolk also acted to accomplish the same purposes individually and through the Institute for Security Design.

One objective of the unlawful conduct was to create multiple sources for rumors concerning the supposed dangers of Securitron locks. The participation of Andra and Kalon in that scheme was efficacious partly because each of them was an actual ongoing business with a presence in the marketplace. Thus, in the scheme to obtain customers for electromagnetic lock installations for New York high schools in 1989, the two corporations made coordinated attacks on the Securitron locks.[1] The

[1] Osborne Frazier, Kalon's managing vice president, sent a letter on October 18, 1988 to a construction inspector for the New York Board of Education; on March 13, 1989, Frazier sent a letter on Andra stationery to James Kokkalis, who was administering the bidding process for the New York school system, also falsely attacking the Securitron locks; on April 4, 1989, Schnabolk wrote to Kokkalis on Kalon stationery repeat-

use of particular stationery at particular times was not random; the jury could conclude that there was a deliberate effort to use both independent entities to give a spurious validity to the rumors. The jury had adequate evidence to support their finding identifying Schnabolk, Kalon and Andra as an association-in-fact and as the persons who conducted the enterprise as well.

We have considered appellants' other contentions regarding the RICO claim and have found them to be meritless.

B. *The New York General Business Law Claim*

Appellants contend that Securitron has no standing to assert a claim under New York General Business Law § 349 because Securitron has not demonstrated any harm to the public and is simply a business competitor of the appellants. We reject this contention.

New York General Business Law § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." Although the statute is, at its core, a consumer protection device, *see Genesco Entertainment v. Koch*, 593 F. Supp. 743, 751 (S.D.N.Y. 1984), "corporate competitors now have standing to bring a claim under this [statute] . . . so long as some harm to the public at large is at issue," *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 786 F. Supp. 182, 215 (E.D.N.Y.), *vacated in part on other grounds*, 973 F.2d 1033 (2d Cir. 1992); *see also Construction Technology, Inc. v. Lockformer Co.*, 704 F.

ing some of the earlier falsehoods; on June 21, 1989, Frazier wrote to Kokkalis on Andra stationery promoting much the same agenda. It would be error to characterize Frazier as nothing more than Schnabolk's amanuensis. He had been Director of Security Services for Newark's Board of Education. Correspondence from him could be expected to carry the weight of his personal experience and reputation.

Supp. 1212, 1222 (S.D.N.Y. 1989). Section 349 does not expressly provide a right of action by one business competitor against another, but it does provide a "right of action to 'any person who has been injured by reason of any violation of this section.' " *H2O Swimwear, Ltd. v. Lomas*, 560 N.Y.S.2d 19, 21 (1st Dep't 1990) (quoting § 349(h)). It is clear that "the gravamen of the complaint must be consumer injury or harm to the public interest." *AZBY Brokerage, Inc. v. Allstate Ins. Co.*, 681 F. Supp. 1084, 1089 n.6 (S.D.N.Y. 1988). The critical question, then, is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor.

Although appellants argue that "there is absolutely *nothing* in this record showing that this private commercial dispute between the plaintiff and the defendant was aimed at the public," they concede that "the public might have been incidentally affected by this private commercial dispute." We think that the harm to the public was manifest. The evidence demonstrated that appellants gave false information about the Securitron Magnalock to the BSA, a regulatory agency primarily concerned with the safety of the public. Schnabolk caused the BSA to undertake unnecessary investigations and interfered with its decisionmaking process by complaining of non-existent "potential danger . . . in fire safety situations." His activities in this respect surely were contrary to the public interest.

Also, appellants disseminated false information to HHC in regard to electromagnetic lock installations at the Neponset Health Care Center and may have caused the unnecessary cancellation of an awarded contract. Finally, it was detrimental to the public interest to divert the attention of UL from its normal activities to attend to

the false accusations and deceptions of the appellants. The UL stamp of approval is frequently required to assure the safety of electrical equipment and installations in New York.

We reject appellants' contention that the injunctive relief granted by the district court on the General Business Law claim is unwarranted and contrary to the free speech provisions of the New York State Constitution.

C. *The Defamation Claim and Damages Generally*

In challenging the judgment on the defamation claim, appellants assert that "plaintiff did not prove a single item of damage from the alleged defamation, except for Mr. Cook's statement that there must have been someone out there who did not deal with the plaintiff because of the defendants' statements." Mr. Cook is Robert Cook, President of Securitron. Citing *Wachs v. Winter*, 569 F. Supp. 1438, 1443 (E.D.N.Y. 1983), as well as N.Y. Jur. 2d *Defamation and Privacy* § 212, appellants contend that defamation damages are limited to actual or compensatory damages commensurate with the harm suffered and that "[t]here was no showing that any specific statement caused any harm at all."

Contrary to appellants' contention, Robert Cook gave extensive testimony regarding the damages sustained by his company. The evidence demonstrated that specific customers, such as the Newark Board of Education and HHC, had stopped dealing with Securitron. Cook testified to a "flattening out" of otherwise increasing yearly sales, which he estimated to reflect the loss of $500,000 in sales and $200,000 in lost profits. Cook was entitled to prove damages through a "projection of lost profits based on evidence of record regarding decreased sales."

See Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 404 (3rd Cir. 1980). Cook's projections provided the jury with a reasonable basis upon which to calculate lost profit damages. *See Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992). Securitron's president was fully capable of examining the company's sales over a period of years, noting a slow-down, and testifying to the estimated losses attributable to the defamatory and fraudulent activities of appellants.

Fed. R. Evid. 701 permits a lay witness to testify to an opinion "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Accordingly, a president of a company, such as Cook, has "personal knowledge of his business . . . sufficient to make . . . [him] eligible under Rule 701 to testify as to how lost profits could be calculated." *In re Merritt Logan, Inc.*, 901 F.2d 349, 360 (3rd Cir. 1990). A company president certainly is capable of projecting lost profits where the projection is based on evidence of decreased sales. *See Teen-Ed*, 620 F.2d at 403-04. It is noteworthy that appellants cross-examined Cook extensively and that the jury did not award the total loss of profits testified to by Cook. The same lost profits were found with respect to the RICO claim.

Duplicative out-of-pocket loss damages were awarded on the RICO, General Business Law and defamation claims. Such damages properly were awarded on the basis of specific travel expense reimbursement statements received in evidence along with the testimony of Cook. The award of duplicative damages for loss of good will also was supported by the evidence.

CONCLUSION

We have carefully examined the remaining arguments for reversal advanced by appellants and find them unpersuasive. We affirm the judgment of the district court in all respects.

Order and Judgment of Trial Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SECURITRON MAGNALOCK CORP.,

Plaintiff,

-against-

CHARLES SCHNABOLK, KALON SYSTEMS, INC. and ANDRA SYSTEMS, INC.,

Defendants.

----------X

ORDER AND JUDGMENT

This action came on for trial before the Court and a jury, Honorable Magistrate Judge Naomi Reice Buchwald, presiding, and the issues were duly tried and the jury rendered its verdict on August 2, 1994 finding that the defendants Charles Schnabolk, Kalon Systems, Inc., and Andra Systems, Inc.:

(i) constituted an enterprise;

(ii) engaged in two or more acts of "racketeering" which were connected by a common scheme, plan, or motive and were committed within ten years of each other and constituted a pattern or [sic] "racketeering" and caused injury to plaintiff Securitron Magnalock Corp. in the amounts of $150,000 in lost profits as a result of lost sales,

$100,000 in out-of-pocket expenses (including travel and related expenses), and $100,000 in injury to reputation and/or loss of goodwill;

(iii) made false written or oral statements that disparaged the business methods and integrity of Seuritron Magnalock Corp. and were communicated to a third party and made with malice (that is, with an evil intent or a motive arising from spite or ill will) and caused injury to plaitiff Securitron Magnalock Corp. in the amounts of $150,000 in lost profits as a result of lost sales, $100,000 in out-of-pocket expenses (including travel and related expenses), and $100,000 in injury to reputation and/or loss of goodwill, which damages are duplicative of those mentioned in paragraph "(i)", above; and

(iv) in the conduct of their business, engaged in materially deceptive acts and practices within the State of New York, the primary injury resulting therefrom being suffered by the public, and other injury resulting therefrom being suffered by Securitron Magnalock Corp. in the amounts of $100,000 in out-of-pocket expenses (including travel and related expenses), and $100,000 in injury to reputation and/or loss of goodwill , which damages are

duplicative of those mentioned in paragraph "(i)", above;

Pursuant to the jury's verdict as described above, it is

ADJUDGED, that the defendants Charles Schnabolk, Kalon Systems, Inc. and Andra Systems, Inc.:

(i) violated the federal Racketeer Influenced and Corrupt Organizations law, 18 U.S.C. 1961 et seq. ("RICO");

(ii) unlawfully defamed the plaintiff Securitron Magnalock Corporation; and

(iii) violated the New York Consumer Protection From Deceptive Acts and Practices law, N.Y. Gen. Bus. Law § 349,

and it is FURTHER ORDERED AND ADJUDGED, that the plaintiff Securitron Magnalock Corporation recover from defendants Charles Schnabolk, Kalon Sytems, Inc. and Andra Systems, Inc. jointly and severally:

(i) three times the sum of $150,000, the actual damages arising from lost profits as a result of lost sales due to the defendants' violations of RICO and unlawful defamation;

(ii) three times the sum of $100,000, the actual

damages arising from out-of-pocket expenses (including travel and expenses) incurred by plaintiff Securitron Magnalock Corp. due to defendants' violations of RICO and N.Y. Gen. Bus. Law § 349 and unlawful defamation;

(iii) three times the sum of $100,000, the actual damages arising from injury to reputation and/or loss of goodwill due to defendants' violations of RICO and N.Y. Gen. Bus. Law § 349 and unlawful defamation;

making a total of $1,050,000 of damages.

It is further ORDERED and ADJUDGED that, pursuant to 18 U.S.C. 1964 (c) and N.Y. Gen. Bus. Law § 349, plaintiff shall recover $284,134 as the reasonable attorneys' fees that it incurred in this action.

It is further ORDERED and ADJUDGED that, pursuant to 18 U.S.C. 1964 (c), plaintiff shall recover $58,847 as the costs of the suit that it incurred in this action, excluding reasonable attorney's [sic] fees.

It is further ORDERED that interest in accordance with 18 U.S.C. § 1961 shall apply to this Judgment.

It is further ORDERED and ADJUDGED that, pursuant to N.Y. Gen. Bus. Law § 349(h) and the request in plaintiff's complaint for injunctive relief pursuant to that statute, the defendants Charles Schnabolk, Kalon

Systems, Inc. and Andra Systems, Inc. are permanently enjoined from engaging in materially deceptive acts and practices within the State of New York including particularly but not limited to the following false and fraudulent statements:

1. Locks manufactured by Securitron Magnalock Corporation short in a lock position,
2. Locks manufactured by Securitron Magnalock Corporation are banned in New York City,
3. The Newark Board of Education regularly issues contracts to have locks manufactured by Securitron Magnalock corporation removed from Newark Schools, and
4. Locks manufactured by Securitron Magnalock Corporation failed in a test administered by Underwriter's Laboratories,

and from threatening any end user who decides to purchase or contemplates purchasing the Securitron Magnalock and/or Securitron products.

Dated: October 18, 1994

S/ Naomi Reice Buchwald

U.S. District Court Magistrate Judge

Notice Pursuant to Rule 8

Pursuant to Local Rule 8, the names of the parties entitled to be notified of the entry of this judgment are Charles Schnabolk, Kalon Systems, Inc., and Andra Systems, Inc. and the name and address of their attorney is: David Jaroslawicz, Esq., Jaroslawicz & Jaros., 150 William Street, New York, New York 10038 (212) 227-2780.

Supreme Court, U.S.
FILED
JAN 10 1996
OFFICE OF THE CLERK

No. 95-893

In The

Supreme Court of the United States

October Term, 1995

CHARLES SCHNABOLK, KALON SYSTEMS, INC. and ANDRA SYSTEMS, INC.,

Petitioners,

vs.

SECURITRON MAGNALOCK CORP.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do two separate corporations and one individual constitute a proper association in fact enterprise under the RICO statute?

2. Is an injunction prohibiting false and deceptive conduct in the marketplace valid under the New York State Constitution ?

STATEMENT PURSUANT TO RULE 29.6

Securitron Magnalock Corp. has no parent companies or non wholly owned subsidiaries.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

On October 20, 1994 an Order and Judgment was filed against Charles Schnabolk, Kalon Systems, Inc. ("Kalon") and Andra Systems, Inc. ("Andra") after a jury verdict in the United States District Court for the Southern District of New York awarding Securitron Magnalock Corporation ("Securitron") (1) $1,050,000 on the RICO count after trebling the total damages, (2) $284,134 as reasonable attorneys' fees on the RICO count and the New York General Business Law count and (3) $58,847 as the costs of the suit on the RICO count. Pursuant to New York General Business Law § 349(h), the Order and Judgment also permanently enjoined Schnabolk, Kalon and Andra from engaging in materially deceptive acts and practices against Securitron within the State of New York.

On September 7, 1995, the United States Court of Appeals for the Second Circuit in a published opinion affirmed the judgment of the district court in all respects. *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995).

The petition for a writ of certiorari should be denied because the question presented by the petitioner on the RICO enterprise does not concern conflicting decisions of courts of appeals and was decided by the Second Circuit Court of Appeals based on settled law. As to the question presented on the injunction issued pursuant to the New York General Business Law, the Second Circuit Court of Appeals based its decision on settled New York State law permitting a court to enjoin deceptive speech in the business marketplace.

STATEMENT OF THE CASE

The facts are fully set forth in the Second Circuit's opinion affirming the district court's judgment. *Securitron Magnalock v. Schnabolk*, 65 F.3d at 258-62. Set forth below is a summary of the

facts which relate to the two issues raised in defendants' petition for certiorari.

A. The Racketeering Enterprise

The proof at trial showed that the racketeering enterprise was an association-in-fact consisting of the defendants Schnabolk, Andra Systems, Inc. ("Andra") and Kalon Systems, Inc. ("Kalon"). Kalon is a corporation in the business of installing security equipment. In 1988 and 1989 Schnabolk was the owner of Kalon and had been its President for the previous nineteen years. In 1988 Osborne Frazier was Vice President in charge of marketing for Kalon. In the late 1980's Kalon had at least fifteen employees. In 1988 and 1989 Kalon sold security systems to schools, museums, hospitals, public institutions, art exhibits and commercial accounts mostly in New York City. In 1990 Kalon was the biggest lock installer of electromagnetic locks on fire doors in New York City.

Andra is a corporation in the business of manufacturing alarm systems, electromagnetic locks and related systems. Andra's electromagnetic lock is known as the Andralock. Prior to May, 1989 the President of Andra was Louie Delisio, and Schnabolk was the majority shareholder with some shares owned by Delisio. On May 1, 1989, Schnabolk's controlling block of Andra stock was sold to undisclosed individuals.

The Second Circuit specifically held that "[t]he jury had adequate evidence to support their finding identifying Schnabolk, Kalon and Andra as an association-in-fact and as the persons who conducted the enterprise as well." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d at 264. Recognizing that "a corporation cannot be both the enterprise and person" [citation omitted], the Court specifically held that "the situation is different here" because "Kalon and Andra were two separate and distinct corporations" and that "Kalon is an entity distinct from Andra, and both corporations are distinct from Schnabolk." *Id.* at 263. The Court also found that

both "corporations were active, operating businesses rather than two stacks of stationery" and that "even if Schnabolk owned 100% of the shares of each corporation, the corporations would be separately existing legal entities capable of constituting an association-in-fact enterprise" [citation omitted]. *Id.* at 263. Finally, the Court found that "[b]oth corporations benefited from the illicit activities of their agents, Schnabolk and Osborne" and because each corporation had "an actual ongoing business with a presence in the marketplace", there was sufficient evidence from which "the jury could conclude that there was a deliberate effort to sue both independent entities to give a spurious validity" to the falsehoods defendants disseminated about the Securitron product. *Id.* at 263-64.

B. The Deceptive Acts Proven Under the New York General Business Law

Securitron, a manufacturer of electromagnetic locks and related locking system equipment, proved at trial that beginning in approximately September 1987 and continuing up until August 1989 defendants Schnabolk, Kalon and Andra intentionally engaged in deceptive acts and practices directed against Securitron through eight separate schemes to defraud. The defendants' goal, as explained by Schnabolk in his own words in a tape recorded conversation, was: "[T]his Securitron thing, I'm trying to put them out of business." The eight separate schemes to defraud were directed at (1) eliminating Securitron's approvals from public and private regulatory agencies, (2) stealing potential business from Securitron and (3) stealing customers from Securitron. These eight schemes to defraud were predicated on the following falsehoods, all of which were designed to destroy Securitron's reputation for making a safe and reliable product:

(1) Locks manufactured by Securitron short circuit in a locked position,

(2) Locks manufactured by Securitron are banned in New York City,

(3) The Newark Board of Education regularly issues contracts to have locks manufactured by Securitron removed from Newark Schools, and

(4) Locks manufactured by Securitron failed in a test administered by Underwriter's Laboratories.

Pursuant to New York General Business Law, § 349(a), (h), the district court enjoined the defendants "from engaging in materially deceptive acts and practices." The Second Circuit summarily "reject[ed] appellants' contention that the injunctive relief granted by the district court on the General Business Law claim is unwarranted and contrary to the free speech provisions of the New York State Constitution." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d at 265.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT PROPERLY APPLIED SETTLED LAW IN RULING THAT THE RACKETEERING ENTERPRISE WAS PROPER.

Petitioner's claim that the Second Circuit's affirmance of the RICO enterprise consisting of two independent corporations and an individual "expanded civil RICO beyond all recognition" is absurd. Br. 9.[1] The RICO statute defines an "enterprise" as including "any union or group of" separate corporations or individuals "*associated in fact although not a legal entity.*" 18 U. S. C. § 1961(4) (emphasis

1. "Br." refers to pages in the defendants' Petition for a Writ of Certiorari.

added). *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) and other cases cited by Petitioner do not apply to the present case since the enterprise proved in this case is an association-in-fact comprised not solely of a single corporation and its employees, but of two distinct corporations which were separate ongoing businesses. Indeed, the only other Circuit which has considered this issue is totally consistent with the Second Circuit's ruling in this case. *Fleischhauer v. Feltner*, 879 F. 2d 1290, 1296-97 (6th Cir. 1989).[2]

II.

THE SECOND CIRCUIT PROPERLY FOLLOWED WELL-ESTABLISHED NEW YORK LAW IN AFFIRMING THE INJUNCTION ISSUED PURSUANT TO THE NEW YORK GENERAL BUSINESS LAW.

Petitioner's assertion that the injunction granted by the district court and affirmed by the Second Circuit "is totally contrary to the protections of free speech imposed by the New York Constitution" is not supported by ironclad principles of New York law. Br. 16. The Second Circuit's affirmance of the district court is consistent with the abundant case law in which the New York state courts have issued injunctions against deceptive or misleading speech in a business context. *See, e.g., Marcus v. Jewish Nat'l Fund, Inc.*, 557 N.Y.S. 2d 886 (1st Dep't 1990); *People v. Record Club of America, Inc.*, 380 N.Y.S. 2d 26 (1st Dep't 1976); *State v. Terry Buick, Inc.*, 520 N.Y.S. 2d 497 (Sup. Ct. Dutchess Co. 1987); *McDonald v.*

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2. Also, under this Court's recent holdings in *Reves v. Ernst & Young*, 507 U. S. 170, 113 S. Ct. 1163, 1173 (1993) and *National Organization for Women, Inc. v. Scheidler*, __ U. S. __, 114 S. Ct. 798, 804, 62 USLW 4073 (1994), it is clear that an individual like Schnabolk can be a RICO defendant and a part of an association-in-fact enterprise consisting of corporate defendants of which he is an officer. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 268-69 (3d Cir. 1995).

North Shore Yacht Sales, Inc., 513 N.Y.S. 2d 590 (Sup. Ct., Nassau Co. 1987); *People v. British & Amer. Casualty Co.*, 505 N.Y.S. 2d 759 (Sup. Ct. N.Y. Co. 1986); *Quinn v. Aetna Life and Casualty Co.*, 409 N.Y.S.2d 473 (Sup. Ct., Queens Co. 1978).

In *Quinn*, for example, the court held that the under the United States and New York Constitutions, "when commercial expression is false or misleading it is afforded no protection whatsoever." *Id.* at 478. Thus, the court found that "an injunction will constitutionally lie against [one of the] defendant['s] . . . continued publication of misleading advertising . . . ." *Id.* at 478-79. This same principle underlies New York's public policy against defendants' deceptive conduct, as exemplified by G.B.L. § 349, which forbids "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . ." and *specifically a*uthorizes the remedy that "any person who has been injured by reason of any violation of this section . . . may bring an action in his own name to enjoin such unlawful act or practice." G.B.L. § 349(a),(h). *See also, Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F. Supp. 820 (S.D.N.Y. 1992) (TRO granted under G.B.L. § 349 prohibiting competitor from publishing report that allegedly contained false and misleading information about plaintiff's history and financial condition).

The injunction issued in this case only prohibits the defendants from engaging in "materially deceptive acts and practices" which fall within § 349's scope. Thus, the injunction is narrowly tailored to enjoin "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . ." and as such restrains conduct and speech that fall entirely outside the scope of the United States and New York Constitutions' protections of speech.

Finally, the United States Supreme Court does not ordinarily review determinations, such as this one, which involve

interpretations of state law. In *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1949), the United States Supreme Court stated that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." The United States Supreme Court traditionally views the courts of appeals as experts regarding the laws of the states within their circuits because they "are better schooled in and more able to interpret the laws of their respective states." *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), *quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). Petitioners have provided no sound reason whatsoever for the Court to deviate from this rule in this case.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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